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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No.....

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of conviction in the United States District Court for the Northern District of Illinois, Eastern Division. The conviction was on both counts of a two count indictment charging violation of 18 U. S. Code, § 1001, by the making and filing of a false affidavit under § 9(h) of the Taft-Hartley Act, 29 U. S. Code § 159(h).

OPINIONS BELOW.

The opinion of the court below is not yet reported. The first opinion of the Court below is reported at 246 F. 2d 77. Both opinions are appended hereto (pp. 28 to 57), *infra*.

JURISDICTION.

The judgment of the Court of Appeals was rendered on January 11, 1960. Petition for rehearing was denied on April 13, 1960. On May 4, 1960 Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 12, 1960.

Jurisdiction of this Court is conferred by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the evidence in this case was sufficient in the following respects to support a judgment of conviction of violation of 18 U. S. Code, § 1001 by filing a false affidavit of non-Communist Union Officer with the National Labor Relations Board's Regional Office, Chicago, Illinois:

   a. The record is silent as to any acts of Communist Party membership or affiliation by petitioner for some thirteen months prior to the filing and some three months thereafter.

   b. The sole evidence of petitioner's Communist Party membership or affiliation is the testimony of a single uncorroborated witness.

   c. The only evidence that petitioner acted knowingly and willfully, *i.e.*, that he knew that the affidavit was to be submitted to a government agency, and that he signed it for the purpose of using the facilities of the National Labor Relations Board, is the mere fact that petitioner signed the affidavit.

d. There is no evidence that the petitioner's union made any use of, or attempted to use the machinery of the National Labor Relations Board while petitioner was an officer of the union.

e. There is no evidence that activities of the petitioner, his union or his employer affect commerce or that the union represented "employees" as defined by the National Labor Relations Act.

f. The evidence did not show that the National Labor Relations Board first received the affidavit in the Eastern District of Illinois.

2. Whether § 9(h) of the Labor Management Relations Act (29 U. S. Code § 159(h)), and 18 U. S. Code § 1001 as here applied are a Bill of Attainder and violate petitioner's rights under the First Amendment to freedom of speech and assembly.

3. Whether the instructions to the jury properly defined membership in and affiliation to the Communist Party.

4. Whether the instructions to the jury properly defined the kind of actual knowledge and specific intent required for a verdict of guilty of violation of 18 U. S. Code § 1001.

5. Whether the court erred in refusing to give cautionary instructions on the testimony of paid informers.

6. Whether the production of statements which report payments to those witnesses, as informers, is excused after a complete foundation for their production under 18 U. S. Code § 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in those statements.

7. The government presented the testimony of three witnesses concerning petitioner's participation in or sub-

scription to the program, activities and policies of the Communist Party. The purpose of this evidence was to show the special characteristics of membership in the Communist Party and the quality of petitioner's alleged membership. The trial court refused to order the production of any prior statements of these witnesses relating to Communist Party program, activities and policies other than those reports relating to the immediate incidents testified to by the witnesses on direct examination. The question presented is whether under these circumstances the production of the witnesses' statements which relate to the program, activities and policies of the Communist Party was excused under § 3500(b) as being beyond the scope of the direct examination.

8. Whether the trial court erred in permitting the prosecution to introduce irrelevant, prejudicial and highly inflammatory evidence of the program, activities and policies of the Communist Party and its members at times when, and places where, petitioner's membership in the Communist Party was not at issue in the case.

9. Whether the trial court erred in permitting the prosecutor to argue to the jury from the failure of the defense to use the statements of witnesses produced under 18 U. S. Code § 3500, when the statements were not in evidence.

10. Whether the trial court erred in permitting the prosecutor to give unsworn testimony in his summation.

STATUTES INVOLVED.

The statutes involved are 18 U. S. Code § 1001, 29 U. S. Code § 159(h) and 18 U. S. Code § 3500. These statutes are set forth in an Appendix (pp. 25 to 28, *infra*).

STATEMENT OF THE CASE.

1. Petitioner was indicted under 18 U. S. Code § 1001. The substance of the indictment charged in two counts that petitioner had on December 11, 1952 knowingly and willfully, and in a matter within the jurisdiction of an agency of the United States, filed a materially false "Affidavit of Non-Communist Union Officer", the oath required by § 9(h) of the Taft-Hartley Act. The allegedly false statements were that petitioner was not on that date a member of the Communist Party (Count I), nor affiliated with it (Count II).

This petition is taken from the Court of Appeals decision affirming the judgment of conviction upon the second trial of that indictment, petitioner's first conviction having been reversed by the Court of Appeals, upon the authority of *Jencks* v. *United States*, 353 U. S. 657, *United States* v. *Killian* (7 Cir., 1957), 246 F. 2d 77.

2. The prosecution's case at trial rested primarily upon the testimony of a single witness, Ondrejka, who testified that he had been a paid informer for the Federal Bureau of Investigation for the period 1949-1954 during which time he had been a member of the Communist Party (tr. 408).* From February 1951 until the date of his testimony he was employed by the Allen-Bradley Company, Milwaukee, Wisconsin (tr. 406), where defendant was also employed (tr. 55).

Ondrejka's testimony placed petitioner, participating as a member, at a Communist Party meeting in April 1951 (tr. 416) and at a Communist Party class in June 1951 (tr. 421). Around November 15, 1951, Ondrejka met with petitioner and their respective wives to form a Communist Party unit at the Allen-Bradley Company (tr. 424-427).

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* Page references prefaced by "tr." are to the stenographic record of the trial proceedings.

For the subsequent 16 months, until February 1953, the record does not show any payment of Communist Party dues by petitioner, nor any attendance at Communist Party meetings, nor any other activity probative of Communist Party membership or affiliation. It was during this period, eleven months after the last meeting with Ondrejka, that petitioner was appointed an interim member of the executive board of the Local Union at the Allen-Bradley Company (tr. 109). Two months thereafter he signed the affidavit. All that the record shows for proof of membership in this period is Ondrejka's conclusory testimony (admitted over objection) that he "knew" the petitioner to be a Communist in the period 1951-1953 (tr. 411-414) and that in the Fall of 1952 petitioner would stop at Ondrejka's place of work and they would discuss "Party affairs" (tr. 430-431). (The substance of these discussions is not reported.)

Subsequently, from the end of February 1953 until August 1953 Ondrejka and petitioner met at several Communist Party meetings and engaged in Communist Party activities.

Ondrejka testified under oath that while employed by the Federal Bureau of Investigation he had courted and married his wife who had borne him three children in this period. At all times during their courtship and marriage Ondrejka had reported his wife's activities as a member of the Communist Party to the Federal Bureau of Investigation. He had never informed his wife that she was under surveillance (tr. 509-513).

The prosecution attempted to bolster Ondrejka's testimony by testimony from two other witnesses, Fensholt (tr. 158 to 182) and Sullivan (tr. 302 to 328) showing petitioner's membership in the Communist Party in 1949 and 1950 while petitioner was a student at the University of Wisconsin.

3. The prosecution also elicited testimony from these three witnesses designed to show the nature of Communist Party membership and the quality of petitioner's alleged allegiance to the Communist Party. The admission of this testimony is assigned as error.

The witness Fensholt testified that in 1949 he had received assignments to work in the Young Progressives of America, to attempt to reactivate the National Lawyers Guild on campus, and to recruit a Negro student into the Communist Party (tr. 173).

Sullivan testified extensively concerning the procedures of his transfer to the Wisconsin Communist Party from Cincinnati, Ohio in 1949 (tr. 305-309) and about the organizational structure of the Communist Party in Madison, Wisconsin in 1949 (tr. 310-311). Defendant and defendant's wife had urged him to associate with Communist girls and had introduced him to such a girl (tr. 314-316). At a Communist Party meeting a speaker praised Communist China, and discussing the united front tactic of the Communists, had said it was an important one (tr. 319). At this meeting the speaker stated that an applicant for federal employment could conceal his membership in the Communist Party (tr. 321). At another Communist student meeting the petitioner had led a discussion of the united front tactic of work in non-Communist organizations (tr. 324-325).

Ondrejka testified concerning a series of Communist Party educational meetings in the Spring of 1951 in Milwaukee. The subjects discussed included the Communist attitude toward war, the international tension and the Party's attitude to it, the national liberation movement and colonialism, the Party peace program, and the local problems of Communist work in the united front (tr. 419). Petitioner had supposedly lectured on colonialism in the Far East, saying that capitalist countries were leeches on

the colonial countries, that only with the guidance and leadership of the Communists could the colonial peoples overthrow their capitalist oppressors (tr. 422-423).

Ondrejka testified that in late February, 1953, at a meeting of the Communist Party, plans were made to start a branch of the Labor Youth League among the employees of the Allen-Bradley Company (tr. 437). He was instructed as a Communist to "smear" a fellow member of the union (tr. 441-443). Ondrejka also testified to plans for a Communist Party fund drive (tr. 448), and a mailing of the May Day issue of the Daily Worker to the union's stewards at Allen-Bradley (tr. 448-449).

4. Petitioner was appointed a member of the executive board of Local 1111, United Electrical Radio and Machine Workers of America (UE) in October 1952. His term of office lasted until February 28, 1953 (tr. 110). On December 9, 1952, the Local President, Kuehne, asked the union officers to come to the union office, where they signed non-Communist affidavits and left them (tr. 113, 119). There was no meeting, the officers coming into the union office over a period of two hours, signing the affidavit and leaving (tr. 118-119). There was no discussion about the significance of the affidavit either prior to, or at the time of signing (tr. 104). None of the signers, including petitioner, read the back of the affidavit where the purpose and effect of filing the affidavit are set out (tr. 118).

Kuehne could not testify of his own knowledge whether or not the signed affidavits were mailed or where they were sent (tr. 119-120). On December 11, 1952 they were received in the Chicago office of the National Labor Relations Board, but it is not known whether they were received by mail or hand delivery or from whom (tr. 32).

5. There was no evidence that at any time between December 11, 1952 and March 1, 1953, Local 1111 made any use or attempted to make any use of the Board machinery.

There is no evidence that its activities were in an industry affecting commerce or that it represented workers within the purview of the National Labor Relations Act.

6. As informers, Ondrejka and Sullivan received payments from the Federal Bureau of Investigation (tr. 500-505, 506, 369-375). Sullivan had given signed reports concerning these sums (tr. 373). Inquiry into the kind of information in these reports was foreclosed by the trial judge (tr. 373-374, 375). Ondrejka had reported his expenditures to an agent of the Federal Bureau of Investigation who wrote them down (tr. 506). The trial judge foreclosed inquiry into whether Ondrejka then signed those statements and into their full contents (tr. 506-509). A general demand was made by the defense for all of Sullivan's and Ondrejka's statements to the government (tr. 330, 455). A specific demand was made for Ondrejka's statements containing the sums received by him (tr. 547-552). The prosecution offered to produce instead a schedule of dates and amounts of payment. This offer was rejected by the defense as inadequate, and the court denied the defense motion (tr. 547-552).

The trial court likewise permitted the prosecution to refuse to produce, pursuant to § 3500, all the prior statements of its witnesses concerning the nature of the Communist Party activities and its program and policies, and to limit the production of such reports to reports of the specific meetings and activities testified to by the witnesses on their direct testimony.

7. Error is assigned to the failure of the trial court to instruct the jury correctly with reference to the statutory requirements that allegedly false statements be made "knowingly" and "willfully", the trial judge's definition of membership in and affiliation with the Communist Party, and his refusal to give a cautionary instruction concern-

ing the testimony of paid informers. These instructions are set forth in an appendix, pp. 57 to 61, *infra*.

8. In his summation to the jury the prosecutor referred to the reports of the government witnesses Fensholt, Sullivan, and Ondrejka, to argue as affirmative evidence of guilt the failure of the defense to contradict the witnesses from these reports (tr. 666). In his summation the prosecutor also made the following unsworn statement with reference to the witness Ondrejka:

> "He was married. The question was asked 'You do not know what the answer is and do not assume you know,' We Know. We talked about it out of your presence." (tr. 655.)

REASONS FOR GRANTING THE WRIT.

1. The representation required to be made by an affiant under § 9 (h) is a narrow one. The affiant swears that he "is not" a member of or affiliated to the Communist Party. Proof of membership or affiliation on another date will not suffice. The prosecution did not show membership on December 11, 1952. The case should have been dismissed by the trial court.

The Court of Appeals, upholding the conviction, relied on the testimony of Ondrejka that he had met with defendant as a Communist in November, 1951 (more than a year before the affidavit was signed), and sixteen months later, on February 22 or February 23, 1953, plus the conclusory statements of Ondrejka (admitted over objection) that he knew the petitioner to have been a Communist from 1951 through August, 1953, and that he had talked with petitioner concerning Communist Party affairs in the fall of 1952. Since the latter two items are plainly insufficient to prove membership or affiliation, the government's case must rest upon the theory that membership and affiliation were shown because it had bracketed the date of sig-

nature by proof of membership at both ends of the sixteen months' period within which the oath was taken.

Such proof cannot overcome the presumption of innocence. Realistic inferences would compel the opposite conclusion, that petitioner, preparing to seek union office, or because of ideological disillusion, severed his Communist connections which he only resumed when he was prepared to abandon union office or when the ideological rupture was healed. The presumption of continuance underlying the theory of the court below is not permissible here. In *Amalgamated Meat Cutters, etc.* v. *National Labor Relations Board*, 352 U. S. 153, Mr. Justice Frankfurter (concurring) noted that even the conviction of a union official for filing a false 1950 affidavit did not sustain the inference that the 1951 affidavit was also false. *C. f. Maggio* v. *Zeitz*, 333 U. S. 56. *A fortiori*, it is impermissible in criminal cases to presume that a status which is innocent continues after the occurrence of events which makes that status criminal. *Wolf* v. *United States* (8 Cir.), 259 Fed. 388; *Colt* v. *United States* (5 Cir.), 158 F. 2d 641.

Hupman v. *United States* (6 Cir., 1955), 219 F. 2d 243, *cert. den.* 349 U. S. 953, did not rest upon a presumption of continuance but upon direct evidence of that defendant's prior agreement to conceal his Communist Party membership.

Serious constitutional problems are raised by the application of § 9(h) in this case. In *American Communications Association* v. *Douds*, 339 U. S. 382, the statute was upheld against the claim it was a bill of attainder and violative of the First Amendment because the oath related only to membership at the time of filing, and permitted a member to abandon his membership on filing and resume it when surrendering his status as a union officer. 339 U. S. at pp. 404, 414. The statute reaches only the "combination" of Communist membership and union activities, 339 U. S. 403. The "permissible inference" of continuance of the

court below transcends the constitutional limitation. The oath would be unconstitutional if it were to relate to past membership and forswear future membership. It is equally unconstitutional if these requirements are not included in the oath, but inserted at one step removed as sufficient proof of guilt on a trial for false swearing.

2. Even in the ordinary criminal case where the government's case may stand or fall on the jury's belief of one witness, his testimony is subject to close scrutiny. *Gordon* v. *United States*, 344 U. S. 414, 417. The continued vitality of the special rule governing perjury prosecutions testifies to the special distrust of the kind of testimony presented in cases involving false swearing. Historically prosecutions involving some aspect of the First Amendment are the particular domain of the paid informer whose testimony is recognized as unreliable. 3 Wigmore § 969, Bowers: *Jefferson and the Bill of Rights*, 41 Va. Law Review 709, 721; Donnelly: *Judicial Control of Informants*, 60 Yale Law Journal 1091; *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1; *Jencks* v. *United States*, 353 U. S. 657; *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99; *Fletcher* v. *United States* (D. C. Cir., 1946), 158 F. 2d 321; *Cratty* v. *United States* (D. C. Cir., 1947), 163 F. 2d 844. Ondrejka admitted that while courting his wife, and during their marriage in which she bore him three children, he was regularly reporting her activities to the Federal Bureau of Investigation. It is difficult to find words for the moral caliber of a man who would not only permit his wife, without remonstrance, to engage in an activity which he knew was under police observation, but would himself report her activities to the police. It is immoral that the petitioner should be convicted of making false statements on the uncorroborated testimony of such a man.

3. The ruling below that the affidavit was material conflicts with the ruling of the Court of Appeals in *Jencks* v. *United States* (5 Cir., 1956), 226 F. 2d 540, 550, that for

conviction the prosecution was required to show use of the affidavit in connection with a Board proceeding. This conflict is a part of a deeper conflict in principle among the Courts of Appeals as to whether or not by the use of § 1001, a highly penal criminal statute, the federal government may bootstrap itself into a power over private citizens which goes beyond the limits Congress has placed upon the power of the various federal agencies, or whether the requirement of materiality narrows the area of criminality even as to statements which may be within the agencies' statutory jurisdiction. *United States* v. *Moore* (5 Cir. 1950), 185 F. 2d 92. See *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598; *Weinstock* v. *United States* (D. C. Cir., 1956), 231 F. 2d 699, 701-702.

In *Weinstock* Judge Prettyman defined a material representation as one that "has a natural tendency to influence, or was capable of influencing the decision of the tribunal in making a determination required to be made." If Judge Prettyman's definition be followed, then the petitioner's affidavit was not material, since by the terms of § 9 (h) no determination was required to be made by the Board until an unfair labor practice charge or representation petition was filed by the petitioner's union. The mere fact that the affidavit was moldering in the Board files makes no difference. It could just as well have been kept in the union files pending need for its production to the Board for all the materiality of its influence on any Board proceeding, *Terry* v. *United States* (8 Cir., 1942), 131 F. 2d 40.

4. Related to the statutory requirement of materiality is the requirement that the statement be made "within the jurisdiction" of a federal agency. The statutory authority of the National Labor Relations Board is limited to matters "affecting (interstate) commerce," *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Since the record is barren of proof of any activity on the part of the defendant, his union, or his employer affecting interstate com-

merce, the ruling below reveals a sharp division among the Courts of Appeals as to whether the jurisdictional requirement of § 1001 refers to the statutory jurisdiction of the agency or includes statements which the agency may receive or even solicit, but concern matters over which the agency has no power. The decisions in *Rolland* v. *United States* (5 Cir., 1953), 200 F. 2d 678; *United States* v. *Moore* (5 Cir., 1950), 185 F. 2d 92; and *Terry* v. *United States* (8 Cir., 1942), 131 F. 2d 40, limit the scope of § 1001. The decisions below expand it.

In *United States* v. *Gilliland*, 312 U. S. 86, 93, this Court spoke of the statute as designed to protect the "authorized" functions of government. This limitation is obviously transcended if the agency may expand its jurisdiction through the use of the criminal law by reason of a defendant's false answers to questions which, because he was not, and could not be made subject to the act, could not have adduced material answers. (*United States* v. *Moore, supra*, at page 95.)

5. The instructions below on the issues of scienter and intent do not follow the ruling of this Court in *Douds* that a conviction under § 1001 requires proof of a specific criminal intent and actual knowledge, rather than a general imputed intent based on constructive knowledge. The *Douds* opinions make it clear that this position is constitutionally grounded to avoid invalidating vagueness under the First and Fifth Amendments. Moreover the rulings below are in conflict with the Court of Appeals decision in *Jencks* v. *United States* (5 Cir., 1956), 226 F. 2d 540, 550 which applied, in a § 9 (h) prosecution the intent and scienter requirements laid down by this Court in *Douds*, as well as with the decision in *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598, where the same requirements were applied in a prosecution under § 1001, not involving § 9 (h).

The Court of Appeals approval of the trial court's instructions permitted conviction upon a finding of constructive rather than actual knowledge and imputed rather than specific intent. The trial judge rejected the defense request to instruct the jury that the affidavit must have been filed for the purpose of inducing the National Labor Relations Board to act (tr. 603). He instructed the jury that the indictment's charge that defendant acted "knowingly" meant merely that he had acted voluntarily as opposed to acting accidentally (tr. 675), and that the natural consequences of acts knowingly done were presumed to be intended (tr. 673-674).

Screws v. *United States*, 325 U. S. 91, was cited in *Douds* as illustrating the type of specific intent required for conviction under § 1001. Under the *Douds* decision therefore "an evil motive to accomplish that which the statute condemns becomes a constitutent element of the crime." *Screws* v. *United States*, at p. 101. "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." *Morrisette* v. *United States*, 342 U. S. 246, 274. Just as "knowing conversion requires more than knowledge that defendant was taking the property into his possession" (*Morrisette* v. *United States*, at pp. 270-271), so a knowing and willful violation of § 1001 requires more than knowledge by the defendant that he was signing a non-Communist affidavit.

The proof of these elements of the statutory crime was likewise defective. The requirement of § 1001 that the allegedly false statements be made "knowingly" and "willfully" include at least the following elements: (1) The defendant's actual knowledge that he was filing the affidavit; (2) defendant's actual knowledge that it was necessary to file the affidavit to obtain the advantages of the Act; and (3) the defendant's specific intent to obtain the

advantages of the Act. See *Jencks*, 226 F. 2d at p. 550. As the opinion below indicates, the sole evidence of these elements is the bare fact of signing the affidavit plus defendant's education and his labor and political background. The barrenness of this record is highlighted by contrast with *Jencks* where the government produced evidence of Jencks' own statements of why he had filed the affidavit, as well as evidence that Jencks himself had filed unfair labor practice charges with the Board.

6. The approval by the Court of Appeals of the trial court's instructions to the jury on the key issues of membership in and affiliation with the Communist Party conflict with decisions of this Court and of other Courts of Appeals. The instructions failed to properly limit and define those terms and were confusing and unconstitutionally vague.

In *Jencks* v. *United States, supra,* Mr. Justice Burton cited with approval the definition of membership in *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99, 107, which defined membership as a consensual status between the alleged member and the organization plus the performance by the alleged member of the objective acts required for membership. This Court in *Douds* likewise recognized that membership was an objective act involving more than "the state of a man's mind." This Court said, "the act of joining is crucial" (339 U. S. at p. 411). The trial court here defined membership solely in terms of a state of mind, omitting any reference to the need for the objective acts required for membership.

The error of failure to define membership properly was accentuated by the listing of twelve matters the jury "might take into consideration" as "indicia of Communist Party membership." Although these indicia differ in part from those raised before this Court by the petition for a writ of certiorari in *Travis* v. *United States* (No. 479,

October term, 1959), they suffer from the same vice. The indicia may have occurred in the remote past. Most are either equally or more consistent with non-membership than with membership.

This is vagueness with a vengeance. The jury was permitted to base a finding of membership on proof either of affiliation, or of support, or even of a remote association with the Communist Party. The instructions not only left the definition of membership in the Communist Party to the juror's own prejudices, it left to those same prejudices the selection of the evidence which might constitute legitimate proof of membership. Defendant was deprived of due process. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Moreover, since the charge permitted conviction on the basis of constitutionally protected speech or associations petitioner's conviction violated the First Amendment. *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353.

The trial court's definition of "affiliated" was equally defective. Although the jury was instructed that "affiliated" meant a relationship of less than membership, it was likewise instructed that the term meant the "equivalent of membership in all but name" and "a close working alliance between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it upon a fairly permanent basis." Thus, the nearly meaningless definition of "affiliated" was so broad and vague that the jury was permitted to equate it either with the defective definition of membership, since it was given no criteria with which to distinguish the two statuses, or with mere support of the Communist Party in its legitimate objectives. The confusion was compounded by the refusal of the requested instruction that a verdict of guilty

could not be returned on both counts, although it would seem obvious that one cannot at the same time have membership status and a relationship less than membership.

Further error was committed by the trial court in refusing the requested instruction that affiliation was not mere cooperation with the Communist Party in its lawful objectives. Thus the decision below conflicts with the decisions of this Court, *Bridges* v. *Wixon*, 326 U. S. 135, and of other Courts of Appeals, *Bryson* v. *United States* (9 Cir., 1956), 238 F. 2d 657; *Fisher* v. *United States, supra.*

7. The fact that the instructions on membership and affiliation opened the door to a conviction based upon the prejudices of the jurors, makes the introduction of remote and prejudicial evidence by the prosecution particularly erroneous. Item after item in the testimony was calculated to arouse the jury's personal antagonism to petitioner, adding little, if anything, of probative value to the decision of the issues framed by the indictment. What reaction is to be expected from a jury in today's world to testimony that Communists were happy with the growing strength of Red China? What overtone of conspiracy, of Hiss, Coplon and the Rosenbergs, lies in the testimony of statements—not linked to or adopted by the petitioner —that government employees might conceal their Communist Party membership? "The reverberating clang of those accusatory words would drown all weaker sounds." *Shepard* v. *United States*, 290 U. S. 96, 104. See also *Keegan* v. *United States*, 325 U. S. 478.

8. The reports given by the prosecution witnesses Sullivan and Ondrejka of payments received as informants for the Federal Bureau of Investigation were "statements" within the meaning of 18 U. S. C. § 3500. Sullivan signed his receipts. Ondrejka may have signed his. His oral statement was recorded by an agent of the government. The statements plainly relate to the subject matter as to

which the witnesses testified. *Rosenberg* v. *United States*, 360 U. S. 367. The ruling below, which sustained the refusal of the trial court to order production of these receipts even for its own preliminary examination, thus raises an important question concerning the administration of justice in the federal courts and is in conflict with the decision of this Court in *Gordon* v. *United States*, 344 U. S. 414.

The prosecution's offer of a schedule of dates of payment and amounts was not an adequate substitute for the statutory requirement. One of the premises of the statute is that defense counsel can use the original statements of a witness as an instrument of truth. The ruling below defeats the statute by permitting the prosecution to furnish the defense with its own bowdlerized version of the statement.

In the *Rosenberg* case, the trial court and the reviewing courts had before them the statements involved. In this case since the statements were never produced, neither the courts nor counsel can say whether the failure to produce them was harmless error or no. (The stubborn refusal of the prosecution to produce these documents at two trials suggests that they contain matter helpful to the defense.) The ruling below is thus in direct conflict with the decision of this Court in *Gordon* v. *United States*, 344 U. S. 414, where this Court said (at page 420):

> "For production purposes it need only appear that the evidence is relevant, competent, and outside any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, it was harmless."

9. Important issues concerning the scope of § 3500, and

the respective roles of the judge and prosecutor thereunder, are raised by the trial court's refusal to order the production of all the statements by Sullivan and Ondrejka relating to policies, activities and program of the Communist Party in the possession of the government. The scope of the statements to be produced under § 3500 is as broad as the direct testimony of the witnesses. *Palermo* v. *United States*, 360 U. S. 343, 349. In this case the prosecution attempted to prove defendant's Communist Party membership on December 11, 1952, not only by proving membership in the Communist Party from 1949 until his election as a union officer, but by introducing evidence of Community Party activities in which he was supposedly involved, the program of the Communist Party, and statements of Communist Party members from 1949. It was the government's theory that they would thereby prove the quality of appellant's past membership, *i.e.*, the nature of the Communist Party, its program and membership practices and defendant's allegiance thereto. This theory was accepted by the trial court which refused to instruct the jury that the Communist Party activities and program were not in issue or evidence of guilt (tr. 604). It was overtly and covertly argued to the jury as a basis for conviction (tr. 626, 629, 631, 640, 641, 642).

Once the prosecution had adopted this method of proof, the defendant was entitled by § 3500(b) to all statements of the witnesses which related to the nature of membership in the Communist Party and its program. Obviously the defense has no direct evidence that such statements exist. That they do exist is indicated by the excisions in, and gaps between the reports given the defense. It is made a certainty by the fact that Sullivan and Ondrejka were paid for many years to make just such reports.

The trial court refused to order the production of statements which did not refer specifically to the defendant

(tr. 243-244). That is not the test of § 3500(b) and the trial court's refusal to order the production of the witnesses' statements, relating to the subject of their direct testimony was error. Underlying the error was the court's fundamental misconception of the respective roles which § 3500 assigns to the prosecutor and the trial judge. The prosecutor claimed for himself the right to make the decision which the statute gives the trial judge.

> "• • • determining what constitutes these reports, oral and written statements made to the Federal Bureau of Investigation by the witness, which relate to his direct examination are a responsibility of the Government, and, as such, the entire judicial process is one which must rely upon the integrity and the desire for fairness of the Government and its attorneys" (tr. 253-254, see also tr. 256, 261, 351, 354-356, 489-491).

The trial judge and the Court of Appeals accepted the right of finality of determination which the government claimed. Throughout the record the court sustained objection to inquiries by the defense into the existence of statements other than those the prosecution saw fit to produce, and into whether they came within the scope of § 3500 (tr. 193, 194, 196, 200-205, 241-244, 253, 256, 261, 350-351, 489-491).

While § 3500 relies upon the government not to conceal or falsify evidence wilfully, this does not mean that the section gives to a party litigant the right to make a complete determination of its own case. § 3500 is implicit with the final authority of the trial judge subject to the appropriate review of the appellate courts. Where a doubt might exist as to the applicability of the section the statement should be submitted to the trial judge for an *in camera* determination and review upon appeal. This was the procedure approved by this Court in *Palermo* v. *United States*, 360 U. S. 343, to determine whether a particular

statement came within the scope of § 3500(e). That procedure should likewise have been followed in determining whether the statement came within § 3500(b).

The attempt by the Court of Appeals to reconcile the trial court's practice with the *Palermo* opinion, distorts the doctrine of that case. The primary burden does not lie on the defense to show "of record" that the government was remiss. The primary obligation lies upon the trial court to order the production of statements when a doubt is indicated as to the prosecutor's right to withhold them. This Court's suggestion that a trial court might fashion proper procedures to determine whether a statement should be produced did not establish a fixed rule that defense counsel must either demand an *in camera* interrogation of witnesses or lose the right to complain of a violation of the section. The record is clear that defense counsel made repeated efforts to determine whether all producible statements had been produced and that the trial judge, regarding the prosecutor's decision as final, frustrated these attempts.

CONCLUSION.

This Court has already granted writs of certiorari in *Campbell* v. *United States*, 362 U. S. 909, and *Travis* v. *United States* (No. 479, October Term, 1959), to review certain aspects of some of the questions raised here. As to those questions it is submitted that a writ should issue here so that this Court may consider the whole of the problem in the light of the special facts arising in this case. The remaining questions likewise present important problems. Conforming oaths proliferate. It is in trials for false swearing that the practical impact of conforming oaths upon the First Amendment may be measured. The problems raised in such trials should be resolved by this Court.

It is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

18 U. S. C., Sec. 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U. S. C., Sec. 3500:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to

be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statements to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

29 U. S. C., Sec. 159(h):

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits. July 5, 1935, c. 372, Sec. 9, 49 Stat. 453; June 23, 1947, 3:17 p. m., E. D. T., 120, Title I, Sec. 101, 61 Stat. 143; Oct. 22, 1951, c. 534, Sec. 1 (c. d), 65 Stat. 601.

OPINION OF JUNE 10, 1957.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11967 September, 1956 Term—April, 1957 Session.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN JOSEPH KILLIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 10, 1957.

Before DUFFY, *Chief Judge*, and FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Chief Judge.* Defendant was convicted on both counts of a two-count indictment charging violation of Title 18 U.S.C. § 1001.[1] This section is incorporated by reference in the Taft-Hartley Act, 29 U.S.C. § 159(h).[2]

1. Section 1001: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

2. "Sec. 159(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-

The indictment charged defendant made false statements to a Government Agency, namely, the National Labor Relations Board, in a matter within the jurisdiction of that Board.

On December 9, 1952, defendant executed an affidavit of a noncommunist union officer. The form and wording of the face of the affidavit appears in the margin.[3]

The first two instructions on the reverse side were, in pertinent part, as follows:

"WHO MUST FILE.—This affidavit must be filed by each officer of a labor organization before that organization may

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month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unti that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits. As amended June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title 1, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1 (c, d), 65 Stat. 601."

3 "United States of America
National Labor Relations Board
Affidavit of Noncommunist Union Officer
Local 1111, United Electrical, Radio and Machine Workers of America (UE)
United Electrical, Radio and Machine Workers of America (UE)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.
2. I am not a member of the Communist Party or affiliated with such party.
3. I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Local 1111, United Electrical, Radio and Machine Workers of America (UE)
United Electrical, Radio and Machine Workers of America (UE)
Signature: John J. Killian
Address: 1233 S. 17th Street
Milwaukee 4, Wisc."

"(Perforated)
"REC'D

receive the help of the National Labor Relations Board. An affidavit must be on file for each officer listed in your Constitution and Bylaws.

"WHERE TO FILE. — Local Labor Organizations must file this affidavit with the Regional Office of the National Labor Relations Board with which they usually file cases." It is without dispute that the Regional Office in question was located at Chicago, Illinois.

From October, 1952 to March 1, 1953, appellant was an officer of Local 1111, United Electrical Radio and Machine Workers of America (UE). This Union had a labor contract with Allen-Bradley Company of Milwaukee. On June 9, 1952, a special meeting of the officers of Local 1111 was held. The principal, if not the sole, business transacted at the meeting was the execution of noncommunist affidavits on the form previously described. As each officer signed his affidavit, it was notarized and then stacked on a desk with the affidavits previously notarized. The affidavits were then placed in an envelope and sent to the National Labor Relations Board. The stamp of the Board on the affidavits shows they were received at the Chicago office of the Labor Board on December 11, 1952, the second day after the signing. After the Board determined that all of the officers had executed affidavits, Local 1111 was notified that it had complied with the Act and could avail itself of the facilities of the Board.

Defendant's first argument is that the allegedly false statement was not made within the jurisdiction of a Government Agency. Section 1001 requires, as an element of the crime, that such statement be "made within the jurisdiction" of an Agency of the United States. We think this contention is entirely without merit. The affidavit came within the jurisdiction of the Board as soon as it was filed. The Board had the power to act upon it, and did, in fact, find Local 1111 to be in compliance under the Labor-

Management Relations Act because the affidavit of defendant and the affidavits of the other officers had been filed.

Defendant next argues that the Government did not prove that he knowingly filed the affidavit or caused it to be filed. Section 1001 is directed to the making of a false statement "in any matter within the jurisdiction of any department or agency of the United States." There is no requirement in that section as to the filing of an affidavit. However, in order to be within the jurisdiction of the National Labor Relations Board, Section 9(h) requires that such affidavit must be on file with the Board.

In response to a question on oral argument, defendant's counsel assured us that he was not contending that the Government must show that defendant, personally, filed the affidavit with the Board. However, he did insist there was no showing that defendant caused the affidavit to be filed. We do not agree. The defendant is a well-educated man. He knew the purpose of the special meeting was to have the affidavits executed. He is presumed to have read what he signed. Certainly, there is no evidence to the contrary. The instructions on the affidavit specifically stated that the affidavit had to be filed with the Board if any Union Local were to be entitled to receive the help of the Board. The affidavits were kept together and were placed in one envelope. They were promptly received by the Chicago office of the National Labor Relations Board. We hold there was sufficient proof that defendant caused the alleged false affidavit to be filed with the Board.

Defendant argues the Government failed to prove he was a member of the Communist Party or was in affiliation with the Communist Party on December 9, 1952, the date when he executed the affidavit. It is true, the record contains no evidence pin-pointing the membership or affiliation on December 9, 1952, but we do not think such proof was necessary to sustain the judgment of conviction.

The proof discloses defendant was a member of the Student Branch of the Dane County, Wisconsin, Communist Party as early as October, 1949. Meetings were held three or four times a month and defendant was a regular attendant. Some of the group meetings were held at his apartment. These meetings were open only to members of this Communist Party group, and a special procedure was used in order to gain admission. These meetings were screened by the playing of phonograph records to avoid suspicion. Defendant paid his dues to the Chairman of this group.

In November or December, 1949, defendant identified himself as a Section Organizer of the Communist Party. Defendant explained to Robert Sullivan that the Communist Party in Madison, Wisconsin, had been broken down into small groups for security purposes; that each group had particular assignments such as the National Association for the Advancement of Colored People, Young Progressives of America, and certain religious groups.

Defendant was the speaker at various Communist group meetings. At some of them he urged all present to purchase subscriptions to the Daily Worker and, on one occasion, solicited funds for the payment of a debt for Party literature. In the spring of 1951 defendant attended a meeting at the home of Jack Kling, the State Chairman of the Wisconsin Communist Party. Defendant attended other meetings where Kling spoke, including one at which Kling stated that those present must accept the fact that there never can be any permanent peace between capitalistic and socialistic countries. Kling pointed out this doctrine had been laid down at an International Conference of the Communist Party in 1927 and those present would have to accept it. Kling also stressed the importance of Communists gaining control of the labor movement in this country.

About the middle of November, 1951, a Communist Party group meeting was held at defendant's home. Defendant stated the purpose of the meeting was to form a cell of the Communist Party at the Allen-Bradley plant. Defendant informed Ondrejka who had joined the Communist Party at the request of the F.B.I. that it was of the utmost importance that they both become stewards in the plant in order to make a more effective Communist Party cell. Both did become stewards but, for security reasons, defendant and Ondrejka avoided each other at the stewards' meetings.

During February, 1953, a Communist Party meeting was held in defendant's home. Also present were Jerry Rose and Ted Silverstein, the South Side Section Leader and Youth Coordinator, respectively, of the Communist Party in Milwaukee. Rose praised the work that defendant and Ondrejka had been doing for the Communist Party at the Allen-Bradley plant, and stated that the time had arrived to coordinate activities under a new Communist Party Club. Rose suggested defendant be made Chairman of the Club because it would be easier for Rose and defendant to meet and discuss agenda. At this same meeting Silverstein discussed plans for the formation of a Labor Youth League at the Allen-Bradley plant.

Later, another Communist Party meeting was held at defendant's home. Again Rose and Silverstein were present and urged the immediate establishment of a Labor Youth League at the Allen-Bradley plant. It was decided at the meeting that this should be done.

In April, 1953, a meeting was held at defendant's house to discuss mailing to certain individuals of a special May Day edition of the Daily Worker. At defendant's suggestion it was agreed to mail a copy to each of the stewards at Allen-Bradley. A week later, a fund-raising meeting of the Communist Party was held at defendant's home.

The quota for the group was $100. Defendant pledged $35 upon behalf of himself and wife.

Defendant assigned himself as a member of the Legislative Committee of Local 1111, but vetoed Ondrejka's choice to be a member of the Welfare Committee. Defendant urged the importance of committee work in a Union, that by control of a Union's committee, the Party could control the Union without being officers of it. Defendant further explained how a single member of a committee could obtain control of that committee.

A meeting was held in defendant's home in May, 1953. Recruiting of members for the Communist Party was discussed. It was decided to send copies of the Daily Worker to "liberal" people at the Allen-Bradley plant. The names of those who appeared to be interested would be turned over to defendant and these would be considered fertile field from which the Communist Party could obtain future members.

Another meeting of the Allen-Bradley group was held in defendant's home in July, 1953. New security regulations were outlined. Members of the group were no longer to contact another member by telephone, the only contact to be through the Chairman. When calling the Chairman, the member was to keep on talking until the Chairman recognized his voice.

It is thus abundantly clear that the defendant was an enthusiastic and dedicated Communist both before and after December 9, 1952. There is nothing in the record to suggest that defendant had a change of heart before or after that date. About three months after December 9, 1952, defendant was the dominant figure in Communist group meetings which were held at his home. At the meeting held February 22, 1953, Jerry Rose, the South Side Section Leader of the Party stated "* * * During the

course of the past the Communist Party was very well pleased with the credible job that John Killian * * * (and Ondrejka) had been doing for the Communist Party." Also, Ondrejka testified he had known defendant to be a party member from April, 1951 to August, 1953.

We hold there is substantial evidence in this record from which the jury could properly conclude that defendant was a member of the Communist Party on December 9, 1952. This would cover the alleged false statement contained in Count 1 of the Indictment. As the sentences imposed were to run concurrently, and the longer sentence was imposed on the first count, the judgment of conviction herein can be sustained if the conviction on Count 1 is upheld.

Defendant claims the proof as to the falsity of his affidavit does not meet the requirements of the two-witness rule in perjury cases. *Weiler* v. *United States,* 323 U. S. 606. This so-called "two-witness rule" in perjury cases is not a constitutional requirement, but a rule of the ancient common law. We hold the two-witness rule in perjury cases is not applicable to prosecutions under 18 U. S. C. § 1001. Two other Circuits have reached the same conclusion. *Fisher* v. *United States of America,* 9 Cir., 231 F. 2d 99, 105; *Gold* v. *United States of America,* DC Cir., 237 F. 2d 764 (reversed on other grounds, 352 U. S. 985).

Defendant urges the trial court erred in refusing to order the production of FBI reports by witnesses Ondrejka, Sullivan and Fensholt. We do not find in the record any request by defendant for the production of such reports by Ondrejka[4] and Sullivan. Having failed to make such demand defendant cannot make claim the Court erred in not requiring that they be produced.

As to Fensholt's reports, a large discretion must be al-

4. There was a request for production of Ondrejka's expense receipts.

lowed the trial judge with respect to the production of documents and in the absence of abuse, the exercise of that discretion will not be upset. *Goldman* v. *United States,* 316 U. S. 129, 132; *d'Aquino* v. *United States,* 9 Cir., 192 F. 2d 338, 375, certiorari denied 343 U. S. 935; *United States* v. *Lightfoot,* 7 Cir., 228 F. 2d 861 (pending on certiorari). The area of discretion is especially broad where (as here) the documents sought are "part of the Government's file." *Goldman* v. *United States,* 316 U. S. 129, 132.

Defendant claims error because of the receipt of certain testimony and also that the Court erred in its instructions. Defendant also advances other arguments by reason of which he claims the judgment below should be reversed. We have carefully considered each of these claims. It would unduly extend this opinion to say more than we have determined that such claims are without merit and cannot be sustained.

The judgment of conviction is

AFFIRMED.

OPINION OF JANUARY 11, 1960.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term and Session 1959

No. 12407.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN JOSEPH KILLIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1960

Before DUFFY and CASTLE, *Circuit Judges*, and MERCER, *District Judge*.

MERCER, *District Judge*. This appeal is taken from a judgment entered upon a verdict finding the defendant guilty on each of two counts of an indictment charging him with having made false statements in an affidavit of non-Communist Union officer filed with the National Labor Relations Board, in violation of Title 18, U. S. C. § 1001.[1]

A prior judgment of his conviction of the same charge was first affirmed by us, *United States* v. *Killian*, 7 Cir., 246 F. 2d 77, but, upon rehearing, on authority of *Jencks*

1. Section 1001: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

v. *United States*, 335 U. S. 657, we reversed the judgment because of the failure of the trial judge to require the government to produce for defendant's inspection statements made by certain government witnesses to the Federal Bureau of Investigation, *United States* v. *Killian*, *supra*, at page 82.

A second trial of the cause before a jury has resulted in a verdict and judgment of guilt on both counts. The latter judgment is now before us on review. Our task is largely simplified by reason of the fact of our prior opinion in this cause. While that fact does not lessen the burden of our duty to review the whole of the immediate record upon defendant's contention that the government has not sustained its burden of proof, we are convinced that several of defendant's contentions are controlled by our prior decision. We have reviewed the entire record and have compared the evidence adduced with our summary of relevant evidence in *United States* v. *Killian*, *supra* at 80-82. From that review and comparison we find that the relevant evidence adduced on the second trial is essentially a carbon copy of the evidence adduced at the defendant's first trial. We therefore conclude that we can, and must, follow our prior adjudication that the evidence was sufficient to support the jury's finding of the existence of every element necessary to proof of the crime charged. Accordingly, we adopt and follow our prior decision in the above respect and limit this opinion to a brief summary of the evidence tending to prove defendant's guilt as found by the jury.

On, prior to and after December 9, 1952 and December 11, 1952, defendant was an employee of the Allen-Bradley Company of Milwaukee, Wisconsin, and a member of Local 1111, United Electrical Radio and Machine Workers of America. From October 1952 to February 28, 1953, defendant served as an officer of Local 1111 by appointment

for the unexpired term of an officer who was then being replaced. The president of the Local notified all officers of that Union to come to the Union Office on December 9, 1952 to execute non-Communist affidavits. Defendant and all other officers came to the office on that date and each executed the requisite affidavits (NLRB Form No. 1081).[2] Defendant was given the affidavit form bearing his name, told to read the document, and then to sign the same, listing his present address. After all affidavits had been signed and notarized, they were mailed by the president or at his direction, to the National Labor Relations Board. Those affidavits were received by the Chicago Regional Office of the Labor Board on December 11, 1952. After receipt of the affidavit, the Chicago office notified Local 1111 that it had complied with Section 9 (h) of the Taft-Hartley Act. 29 U. S. C. A. § 159 (h).[3]

We agree with our prior opinion, 246 F. 2d at 80, that the jury could find that defendant wilfully and knowingly caused the affidavit executed by him to be filed with the Labor Board. In addition to the facts to which we there alluded that defendant is well-educated, that he knew the purpose of the special meeting of union officers called

2. For text of pertinent parts of affidavit, see 246 F. 2d at 79 and 80.

3. Section 9 (h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under sub-section (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period of each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliated or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

for December 9, 1952 and that defendant is presumed to have read what he signed, we add, only that defendant had been active in the labor movement and in the Communist Party for some years prior to the critical date and that he cannot be presumed to have been unaware of the purpose and necessity for the execution of such affidavits.

In disposing of the contention that the government failed to prove that defendant was a member of and affiliated with the Communist Party on December 11, 1952, we need do no more than refer to the able summary by Judge Duffy of the evidence relating to that issue, which evidence is, as we have observed, in all material respects identical to the evidence transcribed in the record before us. See 246 F. 2d 80-82.

Out of deference to the earnestness of defendant's advancement of that contention now, however, we will briefly summarize a part of the revelation of the present record concerning defendant's Communist Party membership and activities. As early as the fall of 1949 defendant was a member of the Communist Party group on the campus of the University of Wisconsin and in the city of Madison, Wisconsin. Meetings of the Party group were held at relatively regular intervals at which meetings Party aims and objectives were discussed and planned. A number of these meetings were held in defendant's home. Witness Sullivan testified that in October 1949 he transferred his Communist Party membership from Cincinnati, Ohio, to Madison, Wisconsin. He first identified himself to the Wisconsin State Chairman of the Communist Party who advised Sullivan that someone in Madison would contact him. Defendant made that contact and identified himself to Sullivan as Section Organizer of the Party in Madison. Defendant handled the chore of assigning Sullivan and others to the Party group or cell with which they were to

work. The testimony reveals a pattern of defendant's activity and leadership in Communist Party matters from late 1949 to the middle of November, 1951, when a Communist Party cell was formed to operate within the Allen-Bradley plant. Defendant suggested to the witness Ondrejka that both he and the defendant should become stewards of Local 1111 to enhance their opportunity for fostering Party aims within the Union. Both became stewards and participated in the stewards' meetings of the Local. In February 1953, defendant took an active part in the efforts of the Communist Party to establish a Labor Youth League Branch within the Allen-Bradley plant.

Ondrejka further testified that defendant discussed Party matters with him at the Allen-Bradley plant on several occasions in the fall of 1952, and that he, Ondrejka, personally knew defendant as a member of the Communist Party from the Spring of 1951 through August 1953. The record reveals a pattern of defendant's active participation in Communist Party meetings and affairs in, and subsequent to, the month of February, 1953.

There is substantial evidence from which the jury could find beyond all reasonable doubt that defendant was a member of the Communist Party when his non-Communist affidavit was signed and filed. To hold otherwise would deny all office to permissible inference and all value to circumstantial evidence as proof of state of mind on a particular day. The jury was certainly justified in inferring upon all of the evidence that defendant's membership and affiliation in and with the Party, which was so actively pursued for a long period of time to a time within a month or two of the date of December 11, 1952, and which was so actively continued beginning in February, 1953, was a continuing membership and affiliation which bridged the critical period without interruption. If that permissible inference is not enough to sustain the verdict the jury may

have believed Ondrejka's testimony that he, personally, knew defendant to have been a member of the Communist Party from 1951 through August 1953. This conclusion is consistent with our prior decision which we consider to be controlling upon this question. *United States* v. *Killian, supra.*

We come now to the principal issues of this appeal which relate to defendant's requests for the production of documents for use in the cross-examination of government witnesses, Fensholt, Sullivan and Ondrejka, upon whose testimony proof of defendant's Communist Party membership rests.

Witness Fensholt testified that he had joined the student group of the Communist Party in October 1949 when he was a student at the University of Wisconsin and that he had been an active member of the Party until August 1950, when he left the University; that he participated with defendant and others in Party meetings and activities during that period of time; and that subsequent to his leaving the University of Wisconsin he had related the facts of the Communist Party activities of himself, defendant and other members of the student group to an agent, or agents, of the FBI.

Sullivan and Ondrejka each testified that he had joined the Communist Party at the request of the FBI for the purpose of reporting to the FBI the identity and activities of Party members. Each testified that he had been paid by the FBI for his services. Each testified that he had made reports to the FBI during the period of his Party membership.

Each of the three witnesses had also testified before the grand jury which had found the indictment against defendant.

We have before us three principal issues, or three prongs

of the same principal issue relating to the court's rulings on defendant's demand for production. As to each of the three witnesses defendant demanded that all statements made by him to the FBI and the transcript of his testimony before the grand jury be produced by the government and delivered to defendant for his use in cross-examination of the respective witnesses. In addition, Sullivan and Ondrejka each testified on cross-examination that he had received compensation for services and reimbursement of expenses by cash disbursement from the FBI, from time to time. At the close of his cross-examination of Ondrejka, defendant demanded that all receipts for such cash payments be produced for his use in further cross-examination of the witness. No demand was made for the Sullivan receipts.

In each instance the court denied the motions for production of the grand jury transcripts. Defendant's demand for production of the receipts signed by Ondrejka was also denied. Upon the basis of his interpretation of Title 18 U. S. C. A. Sec. 3500,[4] the court entered an order requiring

4. Section 3500: (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such

the government to produce and deliver to defendant all statements to the FBI which related to the subject matter of each of the witnesses' direct testimony. With respect to all statements, or parts thereof, which the government contended did not relate to a witness' direct testimony, the court further ordered that such statements be delivered to the court for an *in camera* determination whether the same ought to be delivered to defendant for his inspection and use.

The decisive principles to be applied in the determination of the correctness of the trial court's rulings differ as between each of the statements to the FBI, the receipts, and

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material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical or other recording or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

the grand jury transcripts. We accordingly consider each of those questions separately and in the order listed above.

Defendant's demand for the FBI statements and reports was prefaced upon authority of the decision in *Jencks* v. *United States*, 353 U. S. 657. Thus, when defendant's demand for production was made during the course of the cross-examination of Fensholt and at the close of the direct examination of Sullivan and Ondrejka, defendant contended that he had an absolute right to have access to all statements and reports to the FBI made by the witness on the stand for such use as defendant might make of them on cross-examination. In taking that position, counsel for defendant admitted that the scope of his demand exceeded that provided by the so-called Jencks Act, 18 U. S. C. A. Sec. 3500.

The court construed Section 3500 as superseding the *Jencks* decision and ordered production of all statements and reports which related to the direct testimony of each witness for *in camera* inspection by the court. Such statements were then examined by the court and all matters were excised which the court determined to be not related to the direct testimony of the witness who had made the statement. The statements, as excised, were then delivered to defendant for his inspection and use. After the excision was completed the court impounded the statements, both the originals and a copy as excised, so that the same might be submitted to this court for its inspection.

Subsequent to trial of the case below and while the present appeal was pending the Supreme Court granted certiorari to review *United States* v. *Palermo*, 2 Cir., 258 F. 2d 397, and *United States* v. *Rosenburg*, 3 Cir., 257 F. 2d 762. We deferred consideration of the case until a decision had been made and rendered by the Supreme Court in the above cases. Those cases were decided June 22, 1959. *Palermo* v. *United States*, 360 U. S. 343; *Rosenburg*

v. *United States*, 360 U. S. 367; See also, *United States* v. *Lev*, 2 Cir., 258 F. 2d 9, aff'd, per curiam, 360 U. S. 470.

As a result of the *Palermo* and *Rosenburg* opinions defendant's position is somewhat altered, with his position now narrowed to the contention that the rulings of the trial court deprived defendant of rights accorded to him by Section 3500 as interpreted by the Supreme Court.

We have examined the record with care and conclude that defendant's contentions are without merit. Section 3500, not the *Jencks* decision, now controls the requirement and procedures for the government's production of the FBI reports and statements for a defendant's inspection in a Criminal case. *Palermo* v. *United States*, 360 U. S. 343; *Rosenburg* v. *United States*, 360 U. S. 367, 369. Statements of a witness for the government "made to an agent of the government which cannot be produced under the terms of 18 U. S. C. Sec. 3500 cannot be produced at all." *Palermo* v. *United States, supra* at 351. When prior statements of the witness are demanded, the government "will not produce documents clearly beyond the reach of the statute," and "when it is doubtful whether the production of a particular statement is compelled by the statute such statements must be submitted to the trial judge for an *in camera* determination." *Ibid*, at 354. Section 3500 limits "defense access to government papers" and is "designed to deny such access to those statements" which "do not relate to the subject matter of the witness' testimony." *Id.*

The procedure adopted by the trial court in the instant case could hardly be more faithful to that required by *Palermo* had the trial judge, through prescience and psychic perception, been able to foresee the result of that decision. In the face of the trial court's compliance with standards established by that controlling decision, each of defendant's contentions against the adopted procedure must be rejected. We are faced with no question as to producibility

of the statements involved—each satisfies the statutory criteria of being a statement signed or adopted by the witness, or a "substantially verbatim recital" of an oral statement of the witness and contemporaneously made. The questions before us are concerned with the relationship of the statements to the testimony of the witnesses.

Here, the court restricted production to statements relating to the direct testimony of each of the witnesses. Those rulings were proper and the only rulings permitted by the statute. The statute provides that no statement made by the government witness "shall be the subject of subpoena, discovery or inspection until said witness had testified on *direct examination* in the trial of the case." Subsection (a). After a government witness "has testified on *direct examination*" on a defendant's motion, the court shall "order the United States to produce any statement of the witness in the possession of the United States *which relates to the subject matter as to which the witness has testified.*" Subsection (b). (Emphasis supplied.) The meaning of the statutory language is clear. Congress intended that a defendant be not denied the opportunity to discredit the testimony of a government witness, and to that end has directed that statements given to the government by the witness must be made available to the defendant after the witness has testified on "direct examination," but only to the extent that such statements relate to the subject matter "as to which the witness has testified." Clearly, the intent is that such statements be used for impeachment purposes, and impeachment purposes only. As the court said in *Palermo, supra* at 349, Subsection (a) of the statute "manifests the general statutory aim to restrict the use of such statements to impeachment." The orders restricting production of statements to those relating to the direct testimony of the witness afforded to defendant his full measure of Section 3500 safeguards.

Defendant's second principal contention is, we believe, governed also by the *Palermo* opinion. Thus, defendant contends that the procedure adopted by the trial court permits the government in the first instance to make the determination as to what statements will be produced at all. The statute itself merely provides that the court shall order the production of any statements in possession of the United States which meet the statutory criteria. No protective procedure is established whereby a defendant or the court may determine what statements may exist, except the implied protection of the integrity of government counsel and agents. We do not find this deficiency, if any, shocking. Historically, in the course of litigation, both criminal and civil, much of the judicial machinery for discovery and inspection is geared to the personal and professional integrity of the bar. If for any reason there appears to be any doubt that materials which ought to have been produced under Section 3500 may have been withheld, the trial judge has the power to investigate any breakdown or failure of integrity. Cf. *Palermo* v. *United States, supra*, at 355. The court in *Palermo* was concerned with the question whether demanded documents were "statements" within the definition established by Subsection (e) of the statute, and not with the question here treated. We think, however, the standard established by that opinion is equally applicable to the question with which we are here concerned. In pertinent part, the court said:

> "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production

> of a particular statement is compelled by the statute we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. * * *.
>
> "It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself. In others, further information might be deemed relevant to assist the court's determination. This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need * * * to avoid needless trial of collateral * * * issues while assuring the utmost fairness to a criminal defendant." *Palermo* v. *United States*, 360 U. S. at 354-355.

Here the government produced for the court's inspection a number of statements of each of the witnesses which related to his direct testimony even though that relationship was in many instances remote. Absent some indication that the government was remiss in this regard, and none appears of record, we think both the letter and the spirit of the statute are satisfied. Furthermore, defendant made no demand that the court interrogate the witnesses *in camera* or make other investigation as to whether all producible statements had been produced. On the contrary, defendant's demands were prefaced upon his asserted right to examine all reports, statements, and papers related to each witness without excision so that he might determine whether the same were useful to him. No such right exists. Section 3500 is designed to limit defense access to government papers and "it would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo* v. *United States*, *supra* at 354.

Throughout the trial, defendant's demands for produc-

tion were based upon the same broad contention that he was entitled to a carte blanche production of all statements to the FBI made by a particular witness. That position was grounded upon the defendant's reliance on the *Jencks* case as establishing a rule of constitutional law. It is now clear, however, that the *Jencks* case prescribed only a rule of criminal procedure for federal courts which has now been superseded by enactment of Section 3500, *Palermo* v. *United States, supra* at 345, 347, 348, and that no constitutional questions are involved. *Palermo* v. *United States, supra* at 353, n. 11.

Defendant's arguments against the procedure here employed ignore the weight of competing interests which the statute seeks to reconcile. On the one hand, scrupulous fairness to a defendant in the administration of criminal justice is a matter of vital national concern. On the other hand, the security of the nation, which includes the inviolability of its investigative processes, is a legitimate interest of equal vitality.

The statute deals with this area in which these two competing interests collide by devising a compromise. Both the inviolability of statements to the FBI, desired by the national security interest, and the carte blanche inspection of such statements desired by defendants are required to give and take. On the one hand the government must produce all statements of its witnesses which fall within the statutory definition. On the other, a defendant has a right to demand statements only within the limitations fixed by the statute and is denied a litigant's usual participation in the determination as to what statements must be produced. The rights of a defendant are protected by the supervisory hand of the trial court, acting *in camera*, and by the right to submit his cause to an appropriate court for appellate review.

Inevitably, in a compromise imposed by statute there

is some unhappiness on the part of each party. The test of propriety of the court's rulings, however, is whether or not the court has followed the statute and has accorded to a defendant the rights to which he is entitled.

We have reviewed the original statements produced by the government for inspection by the court and as delivered to defendant after excision by the court. It appears that the government produced even statements having a remote relationship to the direct testimony of the witnesses. It also appears that the excisory hand of the court was liberally applied in favor of defendant and against the government. The procedure employed by the court was scrupulously fair. We therefore reject defendant's contentions against the rulings relative to production of statements given to the FBI.

The next contention of defendant is that the court should have ordered production of receipts given by Ondrejka to the FBI for salary payments and reimbursement of expenses. In the case of Sullivan, no request was made by the defendant for production of such documents and defendant cannot now complain that production was not ordered.

On cross-examination, Ondrejka testified that he had been paid $25.00 per month by the FBI from the time he joined the Communist Party until November 1949 and that his compensation was increased on the latter date to $50.00 per month. In addition, Ondrejka testified that he was reimbursed for all expenses incurred in conjunction with his FBI work. The witness further testified that he would, periodically, give an oral report of expenditures to an FBI agent and the agent would reimburse the witness at a later date. The court sustained an objection to the question whether the witness was required to sign receipts for reimbursements.

After cross-examination was completed, defendant moved to require the production for his inspection of all receipts signed by the witness. The government objected to the motion as one having no basis in statutory law or judicial opinion, but offered to furnish to defendant a schedule of payments for expenses and services which would show dates and amounts of payment. The defense refused to accept the tendered schedule and elected to stand on its motion, whereupon the court denied the motion for production.

We are convinced the court's ruling was proper under the circumstances of this case. The purpose of requiring the production of statements under Sec. 3500 is restricted to their use for impeachment of the witness. *Palermo* v. *United States*, 360 U.S. 343, 349. It is not conceived how defendant could have been placed in a better position by production of these receipts which would have shown only what the testimony had already revealed, namely, that the witness had operated as a paid FBI informant. In a broad sense, a receipt signed by a witness might be characterized as a statement given to the government within the statutory definition. We believe, however, that the demand for production of receipts is a matter within the sound discretion of the trial judge in his conduct of criminal trials. We do not believe the statute requires the court to explore every time-consuming, collateral alley which the defense can devise in a particular case and which bears no direct relationship to the witness' direct testimony. We think this is especially true, where, as here, the information contained in the receipts is established on cross-examination and the government has offered to supply the defendant, without objection and without delay, with a schedule of all information which the requested documents contained.

Fisher v. *United States*, 9 Cir., 231 F.2d 99, upon which

defendant relies, is factually inapposite to the instant case. In that case, two government witnesses were shown to have received in excess of $10,000.00 over a nine year period. One of the witnesses testified that he had received no compensation for his services as an FBI informer, but only reimbursement for his expenses. Under those circumstances, the court held that the failure to produce receipts was error because it related to the question whether the witness had been paid for his services. Here there is no attempt to conceal the witness' identity as a paid government informant.

Finally, on this phase of the case, we need to consider defendant's arguments that the court erred in refusing his request to inspect the transcripts of the grand jury testimony of the witnesses Fensholt, Sullivan and Ondrejka. In each instance, defendant contended, by analogy to the *Jencks* decision, that he had an absolute right to examine the grand jury transcript without the necessity for any foundation for such examination.

Defendant's reliance on the *Jencks*-decision analogy is misplaced. Neither the *Jencks* decision nor Section 3500 controls the production of grand jury testimony. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398.

The *Pittsburgh* decision is squarely in point on this issue of the instant case. The defendants in Pittsburgh were convicted upon an indictment charging a conspiracy under Section 1 of the Sherman Act. One Jonas, called as a witness by the government, testified that he had been contacted by representatives of some of the defendants by phone and, later, had met with them and had discussed and reached an agreement on prices.

At the conclusion of Jonas' testimony, defense counsel established that Jonas had testified before the grand jury three times on "the same general subject matter." Counsel then moved for the delivery to defendants of the minutes

of his testimony before the grand jury. Counsel contended that the defendants had a right to inspect the grand jury transcript which related to the same general subject matter of the witness' direct testimony.[5]

In rejecting that contention the court held that the production of grand jury testimony is governed by Fed. Rules Crim. Proc. 6 (e) which is declaratory of existing judicial precedents, *Pittsburgh Plate Glass Co.* v. *United States, supra,* at 398-399, not by Section 3500 or the *Jencks* decision, *Ibid,* at 398. The basic policy relating to grand jury testimony is " 'a long established policy' of secrecy", *Ibid,* at 399, which may be relaxed only as the ends of justice require disclosure. *Ibid,* at 400; *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 234; in re April 1956 Term Grand Jury, 7 Cir., 239 F.2d 263, 272. In a proper case, a court may order production of grand jury minutes for the use of the defense, *United States* v. *Procter & Gamble,* 356 U. S. 677, 683, but "The burden is on the defense to show that a particularized need exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co.* v. *United States, supra* at 400.

We have no showing here of "particularized need" for production, but only the broad claim of absolute right to access to the transcripts merely upon a showing that the witness has testified before the grand jury. The request for production was based upon a claimed right which does not exist. Denial of that request was not error.

We have reviewed the whole record in this case and find no merit in other contentions of error advanced by defendant. Particularized discussion of remaining ques-

5. Here, the defendant's demand was even broader in scope. Thus, the defense asserted an unrestricted right to examine the transcript of each witness' grand jury testimony, without regard to its relationship to the subject matter of the witness' trial testimony.

tions would only further lengthen an overly-long opinion. We find no error in the court's rulings upon admissibility of evidence or upon instructions. The court's charge to the jury was complete and accurate, and fair to both the defendant and the government. Finally, the error, if any, in the government's summation of the case is harmless error. We are not faced with a situation such as that in *United States* v. *Spangelet*, 2 Cir., 258 F.2d 338, in which counsel for the government made a direct reference to facts not supported by the evidence, and the court, in ruling upon an objection, gave to the jury the impression that defense counsel was being chastized.

The judgment is affirmed.

JUDGMENT.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Monday, January 11, 1960.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Frederick O. Mercer, District Judge.

United States of America,
Plaintiff-Appellee,

No. 12407 *vs.*

John Joseph Killian,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

THE INSTRUCTIONS TO THE JURY.

1. The instruction on intent and scienter:

"You will note that the acts charged in the indictment are alleged to have been done 'knowingly' and 'willfully.' The word 'knowingly' means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word 'willfully' means to act voluntarily and purposely and with the intent to do that which the law forbids (Tr. 675).

"A person is held to intend all the natural and probable consequences of acts knowingly done. The law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done." (Tr. 674.)

2. The instruction on membership:

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves con-

clusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

4. Participated in any recruiting activities on behalf of the Communist Party;

5. Has executed orders, plans or directives of any kind of the Communist Party;

6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

9. Has spoken or in any other way communicated orders, directives, or plans of the Communist Party;

10. Has advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members of the Communist Party, or to anyone else, in behalf of the Communist Party;

11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

12. Has in any other way participated in the activities, planning or actions of the Communist Party.

"These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated. As sole arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment." (Tr. 704-707.)

3. The Instruction on affiliation:

"The verb 'affiliated', as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

"In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statements made or acts done by the accused, and all other facts and circumstances in

evidence which may aid determination of the issue." (Tr. 679-680).

4. The Instruction on the Testimony of Paid Informers:

"Some of the government witnesses have been confidential informants of the Federal Bureau of Investigation. You are at liberty to consider this fact in connection with all other facts relating to such witnesses in determining the weight to be given their testimony. The fact that a witness was compensated by the Government, whether by way of reimbursement for time or expenses as a confidential informant, may be considered by you, along with all other facts and circumstances in determining the weight to be given to his testimony. However, you are at liberty to consider that such witnesses may be telling the truth, and if they have testified to the truth it is just as good as the truth from any other sources." (Tr. 690.)

Instructions Refused.

The trial court refused to give the following instructions requested by the defense:

"In order to find the defendant guilty of the offense charged in the first count of the indictment, you must find beyond a reasonable doubt that on December 11, 1952, the date of the filing of the non-communist affidavit, the defendant was a member of the communist party.

"Not every relation between an individual and an organization constitutes membership. Individuals may be sympathetic or agree with all or part of the program of an organization and cooperate actively with it and still not be a member. Isolated acts of an individual showing cooperation with the communist party or isolated statements of the defendant showing policies, if any be shown by the evidence, are not, standing alone, evidence of membership. Membership must be shown beyond a reasonable doubt to be meaningful and for an unlawful purpose.

"The communist party, like other voluntary organizations, sets forth conditions which a person must ac-

cept in order to become and remain a member. The burden is on the prosecution to prove beyond a reasonable doubt what the conditions for such membership were on the date in question, whether found in its constitution or elsewhere, and that the defendant accepted these conditions.

"Whether intermittent or repeated, the act or acts tending to prove membership and that both the defendant and the communist party intended such a relationship to exist on December 11, 1952, must be of that quality which indicates an adherence to or a furtherance of the illegal purposes or objectives of the communist party as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the illegal program to fruition. Unless there is evidence which convinces you beyond a reasonable doubt of some illegal purpose or objective of the communist party on December 11, 1952 and that the relationship between the defendant and the communist party on and after this date was a relationship based on the illegal purpose or objective, you must acquit the defendant on Count I of the indictment.

"The prosecution must prove beyond a reasonable doubt that on December 11, 1952, the defendant desired and intended and knew himself to be a member of the communist party and that the communist party considered him to be a member as I have defined it herein and knowing that fact filed and caused the affidavit to be filed on December 11, 1952 before you may find the defendant guilty of the offense charged in Count I of the indictment." (Tr. 606-608.)

"Witnesses Robert Sullivan and Michael John Ondrejka were employed as informants by the Federal Bureau of Investigation at all times testified to by them in this trial. For such employment they were paid. In view of the fact that they were employed, their testimony must be examined with greater scrutiny and care than the testimony of an ordinary witness for the purpose of determining whether such testimony was colored by their relationship with the Federal Bureau of Investigation or by the fact that they were paid for such employment." (Tr. 616.)